Filed 6/22/09 In re S.I. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re S.I., A Person Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. LUIS I., Defendant and Respondent; CLAUDIA I., Defendant and Appellant.	B207673 (Los Angeles County Super. Ct. No. CK64422)

APPEAL from an order of the Superior Court of Los Angeles County. D. Zeke Zeidler, Judge. Affirmed.

John E. Carlson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

No appearance for Defendant and Respondent.

Kimberly A. Knill, under appointment by the Court of Appeal, for Minor.

Appellant Claudia I. (Mother) is the mother of S.I. (S.), born in 1996. Appellant was married to Luis I. (Father) from 1989 to 2000. At the time of their divorce, the superior court ordered shared legal custody of S., with Mother having primary physical custody and Father having alternate weekend visitation. In 2006, the family came to the attention of the Department of Children and Family Services (DCFS).

This is the second time this matter has been before us. In an opinion dated December 6, 2007, we reviewed the juvenile court's dispositional order and concluded there was no basis for its requirements that visitation between Father and S. be monitored or that Father participate in domestic violence counseling. Father had raised no issues concerning other portions of the dispositional order, which required his participation in parenting classes and an anger management program. Accordingly, we reversed the dispositional order in part and remanded for further proceedings.

In this appeal, Mother contends that after remand, the juvenile court failed to comport with the directives of this court. Mother specifically focuses on the court's decision to vacate a custody order it issued under Welfare and Institutions Code section 362.4 while the appeal from the dispositional order was pending.[1] We find no fault with the juvenile court's actions and affirm.[2]

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[1] Unless otherwise indicated, statutory references are to the Welfare and Institutions Code.

[2] DCFS filed no brief. Counsel for S. filed a respondent's brief arguing that the juvenile court's order be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Proceedings Leading to Prior Appeal*

In July 2006, DCFS filed a petition alleging that Mother had physically abused S. and left her alone on more than one occasion. S. was detained and released to Father under section 361.2.[3] After a lengthy investigation, DCFS concluded that the conflict between S.'s parents was causing more harm than Mother's physical abuse. The petition was amended to allege that Mother "inappropriately disciplined" S. and that S. was "a victim of an excessive on-going custody dispute between [her] parents" and had been "exposed to verbal confrontations between [them]," which "created a detrimental environment for the child and endanger[ed] the child's physical and emotional health and safety and place[d] the child at risk of serious physical and/or emotional harm or damage."

Prior to disposition, the court ordered a psychological evaluation of the family. The psychologist concluded that S. was depressed due to being caught up in a "bitter custody dispute." He described Mother and Father as "'fairly psychologically naïve, unsophisticated individuals who are quite lacking in insight and [psychological] resources'" with a "'tendency to ascribe blame for problems to other people and circumstances, failing to recognize their own critical role and contribution'" and with "'markedly defensive profiles, clearly suggesting that these individuals have significant tendencies to greatly deny and or downplay problems

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[3] Section 361.2, subdivision (a) provides that when a court orders removal of a child from the custodial parent, it must determine "whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300 . . . ." If that parent desires custody, "the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

and try to present themselves in a very positive or favorable light.'" The psychologist recommended weekly counseling for S. In addition, he recommended that S. be returned to Mother and provided weekend visitation with Father, as in the past.

The caseworker concurred with the psychologist's recommendations that custody of S. be returned to Mother and that S. participate in counseling. However, she added new recommendations in her report to the court, including that both parents participate in conjoint counseling with S. and individual counseling to address domestic violence, and advised the court to limit visitations between S. and Father to a therapeutic setting.

At the January 24, 2007 dispositional hearing, the court ordered Mother to attend conjoint counseling with S. and individual counseling to address domestic violence and anger management. The court ordered Father to attend a parent education program and counseling to address domestic violence and anger management. The court ordered that Father's visitation be monitored. The court found that return to Mother would not be detrimental to S., but made no specific finding with respect to Father. Father appealed the dispositional order.

B. *Proceedings While Appeal Was Pending*

While the appeal from the dispositional order was pending, the juvenile court held additional hearings.[4] At the status conference on February 27, 2007,

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[4] In a dependency case, the juvenile court's dispositional order is the functional equivalent of a judgment; all subsequent orders are considered post-judgment orders. (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 196; *In re Tracy Z.* (1987) 195 Cal.App.3d 107, 112; see *In re James J.* (1986) 187 Cal.App.3d 1339, 1342 ["The jurisdictional order is in the nature of an intermediate order . . . analogous to a criminal conviction, which is appealable not at the time rendered, but after sentencing. The dispositional order is the final step in [dependency] proceedings."].) As explained in *In re Natasha A.* (1996) 42 *(Fn. is continued on next page.)*

DCFS reported that S. recently had an intake appointment with a therapist and that Father had had no contact with the caseworker or visited S. Father's counsel explained that Father was under the impression that visitation was allowed only in a therapeutic setting and only after S.'s therapist approved. S.'s counsel clarified that Father was entitled to monitored visits and asked Father's counsel to convey to Father that S. needed him. The court ordered that all prior orders remain in full force and effect.

At the June 6, 2007 six-month review hearing, Father appeared and conceded he had not participated in the court-ordered programs. He made clear that he did not intend to participate pending resolution of his appeal, but asked that his pre-intervention visitation with S. be restored. Counsel for S. joined in the request that unmonitored weekend visitation be restored, expressing the view that S. would not be at risk of any physical harm in Father's care. DCFS recommended that reunification services and jurisdiction be terminated, and that an order issue granting Mother full physical custody and Father monitored visits only.

On June 11, 2007, the court terminated jurisdiction. Pursuant to section 362.4, the court issued, a "Custody Order -- Juvenile -- Final Judgment" (June 11,

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Cal.App.4th 28, appeals from dispositional orders do not follow the general rule under which, following an appeal, proceedings in the lower court regarding matters embraced in or affected by the judgment or order appealed from are stayed. (*Id.* at p. 39.) Instead, such appeals are covered by an exception contained in Code of Civil Procedure section 917.7, which provides: "'The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change, or otherwise affect the custody, including the right of visitation, of a minor child . . . in an action filed under the Juvenile Court law . . . .'" (*In re Natasha A., supra,* 42 Cal.App.4th at p. 39.) As a dispositional order "necessarily change[s] and affect[s] legal custody" and may "change[] and affect[] visitation as well[,] . . . [a]ll subsequent review hearings would be proceedings 'as to' those provisions of the dispositional order, and hence not stayed." (*Ibid.*; accord, *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 259-260.)

2007 Custody Order).[5] The June 11, 2007 Custody Order stated that Father was to have supervised visitation, once a week, and further stated that Father had not made substantial progress in completing court-ordered programs, specifying that the court had ordered a domestic violence offenders program, parenting classes, conjoint counseling with S. and individual counseling to address anger management.

After the court terminated jurisdiction, DCFS and Mother sought to dismiss the appeal on the ground of mootness. We took judicial notice of post-appeal proceedings in the juvenile court, but denied the motion to dismiss. We concluded the appeal was not moot because the impact of the dispositional order would be felt in future family law proceedings due to the juvenile court's power to issue long-term custody orders under section 362.4 and, although Father could seek to modify the dispositional order in a family law court, he would be unable to challenge its correctness.[6] With respect to the merits of Father's appeal, we reversed the dispositional order in part. We concluded that in order to justify restricting Father to monitored visitation, the court was required to find by clear

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[5] Under section 362.4, the juvenile court, when it terminates jurisdiction over a case in which a family law dissolution order impacting custody of the minor has been entered, may issue an order "determining the custody of, or visitation with, the child." The juvenile court's section 362.4 order "shall be filed in the proceeding for . . . dissolution . . . at the time the juvenile court terminates its jurisdiction over the minor, and shall become a part thereof" and "shall continue until modified or terminated by a subsequent order of the superior court." Orders issued under section 362.4 are sometimes referred to as "'exit'" orders (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300) or "family law order[s]."

[6] We stated in our prior opinion: "[T]he purpose of section 362.4 is to permit the juvenile court to protect dependent children involved in dissolution proceedings by imposing visitation conditions broader than the Family Code permits" and "[s]ection 362.4 anticipates that such an order will be . . . enforced by the family law court." (Citing *In re Chantal S.* (1996) 13 Cal.4th 196, 207-209.)

and convincing evidence that contact with him would cause or risk serious emotional or physical detriment to S., a finding the court did not make and which was not supported by the record or any sustained allegation of the petition. Moreover, we reversed the portion of the dispositional order requiring domestic violence counseling, seeing no basis in the record or the court's findings for that aspect of the order. Appellant raised no issues with respect to the remainder of the dispositional order, which we therefore left intact.

C. *Proceedings Following Appeal*

On January 9, 2008, the juvenile court reinstated jurisdiction for the purpose of addressing the remittitur. On February 25, 2008, over the objections of Mother and DCFS, the juvenile court issued a new custody order under section 362.4 (February 25, 2008 Custody Order). The visitation provisions of the February 25, 2008 Custody Order stated that Father would have visitation with S. on alternate weekends. The Custody Order went on to state that Father had not made substantial progress in the court-ordered programs of parenting classes, conjoint counseling with S., and individual counseling to address anger management. The court issued a separate written order, stating: "The Court has read and considered the Appellate Decision dated 12/6/07 and the [remittitur] issued 2/8/07. [¶] Pursuant to that order the Court is making the following modifications: 1. [Father] is not ordered to attend domestic violence counseling. 2. [Father] may have unmonitored visitation. [¶] The Court is terminating jurisdiction."

Mother sought a rehearing under section 252, contending that the referee who issued the February 25, 2008 orders "exceeded her authority" by "modifying previously issued Welfare and Institutions Code § 362.4 orders [referring to the

June 11, 2007 Custody Order] which [Father] had not appealed."[7] The matter was reheard by a judge. At the April 18, 2008 rehearing, the court stated its tentative decision to vacate both the June 11, 2007 and February 25, 2008 Custody Orders and permit visitation to revert to the more detailed family law order of February 2000.[8] Counsel for DCFS, having originally objected to the referee's issuance of the February 25, 2008 orders, stated: "[I]t's now the Department's position that Referee Kim acted appropriately." Counsel for S. expressed agreement with the court's tentative, as did counsel for Father. Counsel for mother objected, contending that because no appeal was taken from the June 11, 2007 Custody Order requiring monitored visitation, that order should take precedence. The court explained that because the June 11, 2007 Custody Order flowed from the dispositional order and was inconsistent with the appellate opinion, it, too, must be modified or vacated. The court expressed the view that rather than modify, "it's best to get rid of both of them [referring to the June 11, 2007 and the February 25, 2008 Custody Orders]." Mother's counsel stated that there was additional information concerning misbehavior on the part of Father that should be taken into consideration before removing the constraints on visitation. The court responded that any additional information, having not been made the subject of an amended

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[7] Section 252 provides that a party may apply to the juvenile court for a rehearing "[a]t any time prior to the expiration of 10 days after service of a written copy of the order and findings of a referee."

[8] The family law custody order was part of the judgment dissolving Mother and Father's marriage. It included a detailed holiday schedule, which took precedence over the regular weekend visitation schedule.

petition under section 342 or a petition for modification under section 388, could not be considered.[9]

By order dated April 18, 2008, the court vacated both the June 11, 2007 and February 25, 2008 Custody Orders and ordered that the custody arrangement "revert back to the February 14, 2000 family law custody order." The court's final order further stated that "[j]urisdiction is terminated without a [section 362.4] custody order from the dependency court." Mother appealed.

DISCUSSION

Contending the juvenile court failed to follow the directives of this court, Mother asserts: "The Court of Appeal did not instruct the Juvenile Court to take any action regarding the custody order entered at the [June 11, 2007] termination of jurisdiction in the case, and the Juvenile Court was therefore not authorized to disturb, change, modify or vacate the June 11, 2007 custody order." Mother is mistaken.

Appellate courts have the power to "affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." (Civ. Proc. Code, § 43.) "'The order of the appellate court as stated in the remittitur, "is decisive of the character of the judgment to which the appellant is entitled."'" (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 705, quoting *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656.) "'When a cause is remanded with directions to enter a particular

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[9] Section 342 permits DCFS to file an amended petition alleging "new facts or circumstances, other than those under which the original petition was sustained." Section 388 permits any party "upon grounds of change of circumstance or new evidence," to petition the court "to change, modify, or set aside any order of court previously made . . . ."

judgment, it is the duty of the trial court to enter judgment in conformity with the order of the appellate court . . . .'" (*Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 301.) In addition, When the judgment is vacated, "incidental matters, proceedings, or claims based on the judgment are likewise nullified." (9 Witkin, Cal. Procedure (5th ed. 2008), Appeal, § 869, p. 929.)

In our prior opinion, we concluded that the juvenile court's decision to require monitored visitation between S. and Father was not supported by the requisite finding that unmonitored contact with Father would subject S. to risk of serious harm. Moreover, such finding, had it been made, would not have been supported by the evidence in the record. The caseworker purported to base her recommendation that all visitation take place in a therapeutic setting on the report of the psychologist. However, the psychologist had recommended unmonitored weekend visitation. Moreover, Father's mental and emotional imperfections noted in the psychologist's evaluation -- "defensive," "lacking in insight" and having "a tendency to ascribe blame for problems to other people and circumstances" -- were not the type that could justify depriving a parent of normal visitation with his or her child. With respect to the court-ordered counseling to address domestic violence, there were no substantiated findings of domestic violence and the sole allegations were stale, deriving from the long-dissolved marriage to Mother. With respect to anger management counseling and parent education, Father did not challenge those aspects of the order, so we had no cause to address them. Accordingly, we instructed the juvenile court to modify the dispositional order to delete the requirement that Father attend domestic violence counseling and the requirement that his future visitation with S. be monitored. After remand, the juvenile court properly interpreted the decision as requiring elimination of restrictions on Father's visitation and references to domestic violence counseling in the dispositional order and any and all orders that followed it.

In her brief, Mother states: "In its remititur, the Court of Appeal did not order that the family law order entered on June 11, 2007, be vacated or even modified" although we were "aware" of the order. In order to "preserve[] an orderly system of appellate procedure by preventing litigants from circumventing the normal sequence of litigation," appellate courts generally "consider only matters which were part of the record at the time the judgment was entered." (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.) Exceptions exist under which appellate courts may take cognizance of later proceedings (*ibid*.), but the exception applicable to the prior appeal permitted us to become aware of the post-appeal juvenile court orders only for purposes of determining whether subsequent events caused the issues raised by Father to become moot. Accordingly, the June 11, 2007 Custody Order was not before us for review, and we expressed no opinion concerning it. We made clear in our opinion, however, that there was no evidentiary support for depriving Father of normal visitation with S. or for requiring domestic violence counseling. We further made clear that Mother's and DCFS's claim of mootness was faulty, because an incorrect dispositional order could lead to an incorrect section 362.4 custody order, enforceable in future family law proceedings. The June 11, 2007 Custody Order was such an order. Although Father did not appeal it, its restrictions on visitation and its reference to Father's failure to participate in domestic violence counseling derived entirely from the reversed portions of the dispositional order. As our prior opinion dissolved the foundation for those aspects of the dispositional order, the June 11, 2007 Custody Order that flowed from them was also necessarily nullified. (Cf. *Beard v. Goodrich* (2003) 110 Cal.App.4th 1031, 1035-1036 [parties' agreement to vacate judgment automatically extinguished subsequent court order awarding attorney fees].)

With regard to the court's decision to issue no new custody order under section 362.4, and to instead allow visitation to revert to the February 2000 family law order, our instructions did not discuss future proceedings, such as termination of jurisdiction, or specify that a section 362.4 custody order should issue. In determining exactly what is intended by a remittitur "it is necessary that the order 'be read in conjunction with the appellate opinion as a whole' [citation] and, [in some cases], that the order be considered in the framework of the statutory scheme to which it relates." (*In re Candace P*. (1994) 24 Cal.App.4th 1128, 1132.) Where the lower court issues an order outside the express language of the remittitur, the issue is whether the "apparent variance in the trial court's execution of the appellate ruling is 'material.'" (*Id*. at p. 1131; accord, *In re Justin S*. (2007) 150 Cal.App.4th 1426, 1434-1435.) Here, the final decision by the judge to vacate both the June 11, 2007 Custody Order and the referee's February 25, 2008 Custody Order and allow visitation to go forward under the preexisting family law order were within the range of discretion afforded a juvenile court. (See *Bridget A. v. Superior Court*, *supra*, 148 Cal.App.4th at p. 300 [Court of Appeal reviews juvenile court's decision to terminate dependency jurisdiction and issue a section 362.4 custody order for abuse of discretion].)[10]

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[10] The juvenile court stated that any new limitations on Father's visitation rights based on new evidence must be brought to the court's attention by way of an amended petition under section 342 or a section 388 petition for modification. Mother claims that the court's suggestion was in disregard of the established rule that after remand, "'"[t]he lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, [or] retry the case, and if it should do so, the judgment rendered thereon would be void." [Citation.]'" (*In re Francisco W*., *supra*, 139 Cal.App.4th at p. 705, quoting *Hampton v. Superior Court*, *supra*, 38 Cal.2d at p. 656.) The rule refers to attempts to relitigate the facts before the court at the time of the order or judgment appealed. In this case, the rule prohibited the juvenile court from retrying the allegations of the original petition or the facts that supported the original disposition. After remand, DCFS was free to file a section 342 petition and Mother was free to file a 388 petition, *(Fn. is continued on next page.)*

DISPOSITION

The juvenile court's April 28, 2008 order is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.

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both of which permit new facts to be brought to the juvenile court's attention at any time during the pendency of the matter.